Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

REED L. GUTHRIE, Now Deceased,
By and Through MARK GUTHRIE,
Petitioner,

v.

TIFCO INDUSTRIES, INC., RICHARD L. BROWN, ROBERT B. BROWN, LARRY DUKE and ARON AUSTIN,
Respondents.

On Writ Of Certiorari
To The Fifth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

(1) Whether the evidence presented to the courts below was sufficient to support the granting of Summary Judgment as to Guthrie's age discrimination claim.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were: Reed L. Guthrie, Tifco Industrial, Inc., Richard L. Brown, Robert B. Brown, Larry Duke and Aron Austin. Mark Guthrie on behalf of Reed L. Guthrie's Estate is the Petitioner.

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OPINIONS BELOW

The Opinion of the Fifth Circuit Court of Appeals is reported at 941 F.2d 374 (5th Cir. 1991). The opinion of the district court is unreported.

JURISDICTION STATEMENT

The judgment sought to be reviewed was entered on September 13, 1991. Appellant below then filed a Petition for Rehearing, which was denied and entered on October 7, 1991. 28 U.S.C. § 1254(1) confers jurisdiction upon this Court to review the Court of Appeals' judgment.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 623(a) provides as follows:

> (a) *Employer practices.* It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this Act.

29 U.S.C. § 631(a) provides as follows:

> § 631. *Age limits*
>
> (a) *Individuals at least 40 years of age.* The prohibitions in this Act shall be limited to individuals who are at least 40 years of age.

Rule 56—Federal Rules of Civil Procedure

> Rule 56(c). *Summary Judgment*
>
> (c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time

> fixed for the hearing. The adverse party prior to to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

The Fifth Circuit obtained jurisdiction over this case, pursuant to 28 U.S.C. § 1291. Guthrie alleged that he was terminated because of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq., ("A.D.E.A.") and also brought pendent state claims for intentional infliction of emotional distress and wrongful discharge.

The Court of Appeals violated the method of analysis prescribed by Congress and explained by this Court applicable to an A.D.E.A. case. As such, Petitioner seeks review of the Court of Appeals' judgment.

Guthrie was employed by Tifco Industries for approximately nineteen (19) years in Tifco's Purchasing Department until he was forced to leave his employment in February, 1988 at the age of fifty-seven (57). During this tenure, Guthrie ultimately became Vice President of Purchasing and General Manager of Tifco and earned merit pay increases for eighteen (18) consecutive years and became the third highest paid employee with Tifco prior to his departure. Tifco's last official performance rating

gave Guthrie "excellent" marks in ability, conduct, attendance and production as of January 1, 1986, and "excellent" was the highest rating possible in each category. (App. p. 22a). Further, Guthrie's performance would have been rated "very high" if such a rating would have been done as of January 1, 1987. (Id.).

R. L. Brown was Chairman of the Board and President of Tifco until he ultimately transferred this power to his son, Bob Brown, in 1985. Between 1985 and 1987, R. L. Brown made various statements to Guthrie strongly hinting that Appellant's employment relationship with Tifco would become very tenuous after Bob Brown became President. Specifically, R. L. Brown told Guthrie on "numerous occasions—several occasions" that Bob Brown was going to need to surround himself with people his age when he became President of Tifco. (App. p. 9a). In addition, R. L. Brown asked Guthrie many times how must longer he intended to work for Tifco. (Id.).

Soon after the transition of power to Bob Brown was complete, Guthrie was demoted to a position as "senior buyer," took a forty per cent (40%) pay cut, and was forced to incur an even larger reduction in his status, prestige and dignity at Tifco. Beyond that, Guthrie was replaced by and was required to work under Aron Austin, a person seventeen (17) years younger than Guthrie, even though Aron Austin had little experience in purchasing and was trained by Guthrie. Such conditions were so intolerable and devastating that Guthrie ultimately left his employment at Tifco in February, 1988.

R. L. Brown's statements to Guthrie that Bob Brown would need to surround himself with younger people when he became President of Tifco ultimately came true because Bob Brown was able to get rid of Guthrie and

promote Aron Austin to fill Guthrie's position just a few months after Bob Brown became President in 1987. Although Respondents articulated "reasons" to "legitimize" this treatment of Guthrie, the direct evidence cited above and the indirect evidence summarized at length below at least create a fact issue that Guthrie was ousted from Tifco because of his age. A proper application of the A.D.E.A. analysis set forth by Congress and this Court consistent with the correct application of the rules applicable to a Summary Judgment Motion compels such a result. Accordingly, Petitioner seeks review of the Court of Appeals' judgment on this issue.

ARGUMENT

I.

THE COURT OF APPEALS ERRED BY AFFIRMING THE TRIAL COURT'S GRANTING OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT ON GUTHRIE'S AGE DISCRIMINATION ACTION.

Guthrie alleged in his Complaint that Respondant, terminated his employment in violation of the Age Discrimination in Employment Act ("A.D.E.A."), codified at 29 U.S.C. § 621, et seq. Specifically, § 623(a)(1) of A.D.E.A. states that [i]t shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's age." Stated simply, the A.D.E.A.'s purpose is to eliminate age discrimination from the work place by making age discrimination against persons forty (40) or older illegal. *Lorillard v. Pons,* 434 U.S. 575, 584 (1978).

The court of appeals erroneously deprived Guthrie of his right to pursue an action under the A.D.E.A. by affirming the trial court's granting of Respondent's Motion for Summary Judgment.

The trial court's and court of appeals' granting of Respondents' Motion for Summary Judgment on Guthrie's A.D.E.A. claim clashes with Fed. R. Civ. P. 56(c) because that rule entitles a defendant to summary judgment only if the summary judgment evidence shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The non-movant's allegations in opposition to the Motion for Summary Judgment are taken as true, and the non-movant also receives the benefit of all doubt when the summary judgment evidence conflicts. *E. C. Ernst, Inc. v. General Motors Corp.*, 537 F.2d 105, 108 (5th Cir. 1976). Rather than adhere to these well established principles and analyze Guthrie's action accordingly, the court of appeals simply ignored these principles and Guthrie's evidence and erroneously granted Respondent's Motion for Summary Judgment.

More importantly, the court of appeals, has recognized that summary judgment is generally an inappropriate device to be employed to resolve age discrimination claims because such claims hinge upon determinations regarding motivation and intent that are best resolved by the appropriate factfinder. *Thornbrough v. Columbus & Greenville R. Co.*, 760 F.2d 633, 640-41 (5th Cir. 1985).

Rather than follow its own pronouncements, the court of appeals contrary to such pronouncements and er-

roneously affirmed the trial court's granting of Respondents' Motion for Summary Judgment on Guthrie's A.D.E.A. claim.

The court of appeals correctly recognized that the element of a Title VII case as set forth in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) apply to an A.D.E.A. case. Specifically, a plaintiff must initially establish a *prima facie* case of age discrimination[1] by presenting evidence that the Plaintiff (1) was actually or constructively discharged or otherwise treated less favorably than a younger person; (2) was within the protected class at the time of discharge or demotion (at least forty (40) years of age); (3) was qualified for the position; and (4) was replaced by someone outside the protected class or by someone younger. *Thornbrough*, 760 F.2d at 639; *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1504 (5th Cir. 1988). Once the *prima facie* case is established, the burden of production shifts to the employer and requires the employer to rebut the presumption of age discrimination by articulating some legitimate and non-discriminatory reason why the Plaintiff was discharged or demoted. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981). Assuming the employer meets this burden, the burden then shifts back to the employee to prove that the reasons articulated by the employer are not true reasons for the termination, but only pretext. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983); *Thornbrough*, 760 F.2d at 639. The evidence presented to the trial court is over-

1. Establishing a *prima facie* case imposes upon the Plaintiff a need to "only make a very minimal showing." *Thornbrough, supra* at 649.

whelming and clearly shows that Appellant met his burden of production and was entitled to receive a trial by jury for his A.D.E.A. claim, and the trial court's contrary holding is erroneous and must be reversed.

A. The Court of Appeals Correctly Recognized that Guthie established a Prima Facie case of Age Discrimination.

1. Respondent constructively discharged or demoted Guthrie from his employment and treated him less favorably than a younger person.

The evidence is very clear that Guthrie was constructively discharged from his employment and treated less favorably than a younger person in contravention of the A.D.E.A. The federal courts have clearly recognized that an employer may constructively discharge an employee by deliberately subjecting the employee to intolerable working conditions,[2] and an employee's "resignation" under such circumstances is given the same legal effect for A.D.E.A. purposes as would be given to an employer's actual discharge of an employee. *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985).

Besides a constructive discharge, the first element of Guthrie's *prima facie* case is satisfied if Guthrie is de-

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2. The working conditions to which an employee is subjected that allegedly constitute intolerable working conditions for constructive discharge purposes are evaluated by an objective standard that requires the fact finder to be satisfied that the new working conditions have become so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. *Calhoun v. Acme Cleveland Corp.*, 798 F.2d 559, 561 (1st Cir. 1986).

moted or otherwise treated less favorably than a younger employee. *Thornbrough,* 760 F.2d at 639. The evidence showing that Respondents constructively discharged, demoted and/or otherwise treated Guthrie less favorably includes the following:

1. Respondents demoted Guthrie from Vice President of Purchasing and General Manager to the position of Senior Buyer. (App. p. 7a).
2. As a result of this demotion, Guthrie's salary was to drop from $86,000.00 to $50,000.00, which amounts to a decrease in salary of over 40%. (App. p. 13a).
3. Respondents' demotion of Guthrie lead to the promotion of Aron Austin and required Guthrie to work for and be supervised by Austin, a man seventeen years younger.

The facts in this case compare more than favorably to successful A.D.E.A. cases that have satisfied this element and render a grant of summary judgment improper. See, e.g., *Cockrell v. Boise Cascade Corp.*, 781 F.2d 173 (10th Cir. 1986), *Calhoun v. Acme Cleveland Corp.*, 798 F.2d 559, 563 (1st Cir. 1986). The evidence is clear that Respondents constructively discharged Guthrie or otherwise treated him less favorably than a younger person.

2. Guthrie was within the protected class when he was constructively discharged and demoted.

It is undisputed that Guthrie was fifty-seven (57) years old when he was constructively terminated, demoted and otherwise treated less favorably than a younger person in violation of the A.D.E.A. Section 631(a) of the A.D.E.A. definies the class protected by the statute to be limited

to individuals who are at least forty (40) years of age. Guthrie's age of fifty-seven (57) when the unscrupulous activity occurred places him well within the protected class.

3. Guthrie produced extensive evidence to show that he was qualified to remain as Vice President of Purchasing and General Manager of Tifco.

Guthrie remained qualified to be Vice President of Purchasing and General Manager of Tifco until the day he was expelled from Tifco. The qualifications element of Guthrie's *prima facie* case can be met by showing that the employee continued to possess the necessary qualifications for his job when he was discriminated against and "had not suffered physical disability or loss of a necessary professional license or some other occurrence that rendered him unfit for the position for which he was hired." *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1506 n. 3 (5th Cir. 1988). Respondents intimated in deposition testimony that Guthrie's alleged performance deterioration could be explained by and was directly attributable to his hospitalization and sickness in 1985. Guthrie admittedly experienced health problems around April, 1985, resulting in the removal of his left kidney and the correction of an aneurysm on his iliac aorta. (App. p. 9a). Richard L. Brown seemed "most concerned" about Guthrie's post operative condition and felt that "it might be possible" that Guthrie's job performance was affected by his surgeries. Further, although failing to be specific, Richard L. Brown testified that he had an "impression" that Guthrie had trouble concentrating in meetings and discussions after the surgery, but Mr. Brown could never be more specific than that. (App. p. 24a-25a). Finally, Mr.

Brown even testified that he asked Guthrie whether Guthrie was taking any medication or had any medical problems after the surgery. (App. p. 25a).

Tifco's own internal documents and pre-litigation actions clearly show that Guthrie had lost no job abilities or qualifications after his surgery. Specifically, Bob Brown approved a raise for Guthrie from $83,000.00 a year to $86,000.00 a year, effective on January 1, 1986, and further rated Guthrie as "excellent" in ability, conduct, attendance and production *after* his return from surgery. (App. p. 22a). Bob Brown further testified that had he been required to evaluate Guthrie's performance for 1986, he would have rated such performance as "very high." (*Id.*) Bob Brown's deposition testimony establishes without question that Guthrie's qualifications did not slip or diminish in any way following his operation in 1985.

4. Guthrie was replaced as Vice President by someone significantly younger.

Finally, the evidence is clear and undisputed that Guthrie was replaced as Vice President of Purchasing by a person seventeen (17) years younger than himself. That is, Guthrie's purchasing duties were assumed by Aron Austin in early 1988, (App. p. 13a), and Austin was seventeen (17) years younger than Appellant. (App. p. 9a). An age discrimination inference is established by showing that Plaintiff was replaced by a worker sufficiently younger than himself, even if the younger worker happens to fall within the protected class or age group. *McCorstin v. United States Steel Corp.*, 621 F.2d 749, 754 (5th Cir. 1980); *Maxfield v. Sinclair Intern.*, 766 F.2d 788, 792-93 (3rd Cir. 1985). Clearly, the seven-

teen (17) year age disparity between Guthrie and Aaron Austin establishes this element.

5. The Court of Appeals correctly concluded that Guthrie established a prima facie case of age discrimination.

The court of appeals recognized and concluded that Guthrie established a *prima facie* case of age discrimination. The evidence clearly supports this conclusion and shows its correctness. Accordingly, Respondents clearly are not entitled to summary judgment based upon any failure of Guthrie to establish a *prima facie* case of age discrimination.

B. Petitioner's Successful Establishment of a Prima Facie Case of Age Discrimination Against Respondents Requires Respondents to Articulate a Legitimate and Non-Discriminatory Reason to Explain Respondents' Treatment of Guthrie.

Once Petitioner establishes a *prima facie* case of age discrimination, Respondents then have the burden to articulate a legitimate and non-discriminatory reason to explain Guthrie's treatment. *Burdine, supra,* 450 U.S. at 253-54. Petitioner respectfully submits that the court of appeals erroneously asertained or determined the alleged legitimate reason upon which Respondents relied to explain Respondents' actions and support summary Judgment, and this critical error caused the court of appeals, to erroneously affirm the trial court's granting of Respondents' Motion for Summary Judgment. Specifically, the court of appeals concluded that the alleged legitimate reasons for Guthrie's termination was

thirteen (13) reasons contained in a handwritten list prepared by Bob Brown around the time of Guthrie's termination and based its analysis of this issue upon this conclusion. Although Bob Brown may have listed these reasons prior to the commencement of this litigation, these are *not* the reasons upon which Respondents relied in their Motion for Summary Judgment to "legitimize" their treatment of Guthrie and require Guthrie to show the pretextual nature of such reasons to defeat Summary Judgment. As shown in the Motion for Summary Judgment filed by Respondents and included within the Appendix attached hereto, the actual alleged legitimate and non-discriminatory reason explaining Guthrie's treatment, and to which Guthrie had to respond, are as follows:

> "Tifco demoted Guthrie because of his unwillingness to accept responsibility, make decisions, supervise employees, or effectively manage his department." (App. p. 7a).

C. A Genuine Issue of Material Fact Exists with Respect to whether Respondents' Articulated Reasons for Guthrie's Termination and/or Demotion Are Simply Pretextual.

The evidence produced by Guthrie during the summary judgment proceedings is sufficient to create a fact issue with respect to whether Respondents' articulated pretextual and renders the court of appeals' affirmance of the trial court's judgment improper. Although an employee's qualifications may change from time to time, *Grohs v. Gold Bond Building Products*, 859 F.2d 1283, 1287 (7th Cir. 1988), the evidence summarized herein shows without doubt that Guthrie's performance and qualifications did not deteriorate in

1987. Further, although the A.D.E.A. cannot be used for judicial second guessing of an employer's exertion of his legitimate business judgment even if the employer makes a mistake, "we may begin to wonder whether (an employment decision) was a mistake at all" if such mistake is large enough. *Thornbrough, supra,* at 647. The only credible explanation Guthrie's termination is that Bob Brown implemented his father's suggestion (which R. L. Brown relayed to Guthrie on numerous occasions) and sought to surround himself with people his own age and placed Aron Austin in Guthrie's position as part of the strategy.

1. Guthrie clearly showed a willingness to accept responsibility at Tifco.

Respondents' assertions that Guthrie would not accept responsibility at Tifco are simply inconsistent with Respondents' own conduct. Guthrie's insatiable dedication and willingness to accept responsibility can be no better illustrated than by considering Guthrie's actions in April, 1985 when he quickly returned to work after having his left kidney removed and undergoing open heart surgery. Even Bob Brown recognized this when he testified in his deposition as follows:

Q. Do you feel like he got back to work pretty quickly after his (1985 medical) problems?
A. Yes, I thought so.

(App. p. 23a).

A perfect example of Guthrie's willingness to accept responsibility and solve problems is Guthrie's handling of problems associated with Tifco's flat washer purchases between 1982 and 1987. Aaron Austin's own deposition testimony clearly illustrates Appellant's willingness to

accept responsibility and achieve results and provides as follows:

Q. The one occasion between '82 and '87; do you mean you got a shipment of flat washers in and some of them were brittle by your testing or by your customer complaints?

A. We had some customer complaints to the degree that we sent out a bulletin to the sales force that said if you will send us back all of that particular washer that's in your customers' bins we're going to replace those washers at no charge to the customer.

I do remember that specifically being one of the times.

Q. And this is some time between '82 and '87.

A. If my memory is correct, and I'm almost sure it is, it would have been within that time frame, yes.

Q. Did Mr. Guthrie, was he the person who was responsible for getting the word out that the washers needed to be replaced?

A. I don't remember if Reed's name was on the bulletin that went out to the sales force.

He was certainly responsible for purchasing them.

Q. Did Mr. Guthrie take care of the problem during this instance between '82 and '87, where you had gotten the bad lot in and had to recall them?

A. Well, we shipped out good washers, the problem recurred; but I'm suure that time we got the problem taken care of.

I don't know if Reed specifically talked to those people himself or not. But we did receive replacement product, I'm sure.

Q. And he (Appellant) was in charge of making sure that happened?

A. I assume, yes, he was.

(App. p. 27a).

Another example showing the pretextual nature of Respondents' claim involves Guthrie's supposed avoidance of his responsibility to return poor quality nuts to the manufacturer. (App. p. 13a). When questioned about this situation in his deposition, Guthrie responded as follows:

> I said 'Regardless, we can't sell this quality. We reject the lot.' And I shipped them back. He said 'Who authorized that?' I thought it was a fluff-off question; so I said 'The President of the company looked at the lot and has agreed that they are unacceptable, so they are being shipped back.' And, I think he was bluffing.

(App. p. 13a).

The manufacturer then wanted to go over Guthrie's head because Guthrie would not yield to his demands, so Guthrie transferred the call to Bob Brown. Transferring a call to the company president under such circumstances is certainly understandable and can hardly be considered an evasion of responsibility, especially considering that Guthrie made his final decision and did everything he could within his authority.

2. The evidence is clear that Guthrie exhibited extreme willingness to make decisions for Tifco.

The evidence is compelling that Guthrie was willing and able to make the hard decisions required by a person holding the position of Vice President of Purchasing and General Manager of Tifco. One such hard decision made by Guthrie was not to enter into a supplier relationship with a company called Detroit Diamond.

R. L. Brown felt that Detroit Diamond was a "dependable source" and testified that Guthrie "made the comment that he thought they (Detroit Diamond) were out of business." (App. p. 12a). Guthrie's deposition testimony clearly and unequivocally contradicts R. L. Brown's deposition testimony by providing as follows:

> Q. How did Detroit Diamond get into the hunt, so to speak?
> A. I looked them up in the McCray's Blue Book.
> Q. Hadn't they been a supplier some time ago?
> A. Twelve or fifteen years ago we bought a "cone lot" from them from a sales ag that was selling in Tulsa, Oklahoma. He lost the account. We sent it up. Detroit wouldn't take the product back. We don't buy the small quantities. We needed to complete the line to continue viably selling it. *And they cut us off for low purchases, so we had no source.* And until this scare on the grade 8 screws came up, I didn't try to use them again.
> Q. Didn't you opine to Richard Brown you thought they were out of business?
> A. No sir, I knew they were a specialty nut manufacturer.

(App. p. 12a).

Guthrie's deposition testimony clearly shows that he was aware of Detroit Diamond's existence and its ability to manufacture the special nuts but opted not to engage this company because of past experience where this company decided to "cut Tifco off" and leave Tifco without a product source. Notwithstanding Guthrie's pressing needs for these special nuts, Guthrie decided that foregoing a business relationship with Detroit Diamond was in Tifco's best interests based upon prior experience. Further, it must be emphasized that the situation in-

volving Detroit Diamond occurred in 1987, or just prior to the time that Guthrie was victimized by age discrimination. (App. p. 12a).

A second example of Guthrie's ability to make decisions occurred in October, 1987 when Tifco received a poor supply of finished hex nuts that needed to be returned to the manufacturer. Bob Brown criticized Guthrie for informing him that this problem existed and testified to this point as follows:

> Q. What was it specifically about the quality of finished hex nuts in October, 1987 that makes you critical of Reed Guthrie?
>
> A. Basically, we had gotten in a shipment of finished hex nuts in from a vendor; and Reed came to me and said that he had—that we had received a shipment of finished hex nuts from this vendor, and that there was a lot of problems with the quality on them and that he had just been out to the purchasing—or out into the receiving area and had looked at them. And he asked me if I would like to look at them also, and I said 'sure'. So I went there with Reed and we looked. He showed me—we opened up a bunch of different kegs and we looked at the finished hex nuts and the quality of these nuts were very poor—I think the nuts being tapped off center. There were a lot of burrs—there was generally just poor, poor quality.
>
> And Reed pointed this out to me. And I asked him—you know, he asked me—or I asked him, 'what do you think we should do? And he volunteered, he said he felt we should return the entire shipment. And I agreed. I said 'sounds good'.

(App. p. 19a-20a).

Stated simply, Bob Brown's criticism of Guthrie in this instance was simply that Guthrie informed Bob Brown that a major supplier had shipped Tifco a load of "very poor quality" goods and that the entire shipment would be returned to the manufacturer. It is clear that Guthrie was going to return this entire shipment with or without conferring with Bob Brown, and the mere fact that he informed Mr. Brown of this decision does not in any way reflect an unwillingness to make decisions.

Although Respondents have attacked Guthrie for his alleged unwillingness to accept responsibility and make decisions because he would consult with his superiors, equally chastise Guthrie for making clearly independent decisions by complaining that they should have been consulted before certain decisions were made. Nowhere is this more aptly illustrated than in Bob Brown's following deposition testimony:

Q. Item 9 was the question about Mr. Guthrie ordering 9/16 hex nuts?
A. That's correct.
Q. Will you tell me what your criticism of him was about that?
A. Basically that had to do with Reed placing an an order for some private branded hex nuts; and he came into my office and he showed me the size of the purchase order, the magnitude of the purchase order, and he said, 'I'm fixing to place this purchase order. Is this okay?' And I looked at it, and I looked at the amount and I said 'it looks like it's fine to me.'
And basically—after the order came in, Frank Adams came to me in my office, and he said 'do you realize that we ordered a 50 year supply of 9/16 nuts?' And I said 'no, I didn't really realize that.'

And I felt that if Reed would have brought it to my attention that we were ordering a 50 year supply of these nuts, that I would have made a different decision as far as ordering these nuts. And I felt that was my criticism in that case.

Q. Well, are you saying that Reed Guthrie didn't have some reason that he communicated to you about ordering so many hex nuts of this side?

A. No, I believe Reed had to order that quantity of hex nuts to get a minimum production line. The thing where I fault Reed for is not bringing it to my attention that he was going to—this placing of this minimum production line was going to run approximately a forty or fifty year supply of these nuts, and do you really want to place—make that type of investment.
And I would have said no at that point in time.

(App. p. 20-21a).

Guthrie testified, and Bob Brown admitted that, such a purchase was necessary in order to obtain *any* 9/16 nuts. (App. p. 12a, 21a). Guthrie further testified that Bob Brown, R. L. Brown and Guthrie had discussed adding this line of 9/16 nuts to Tifco's inventory, and "the major reason they (Bob Brown and R. L. Brown) wanted to go ahead and add the 9/16 nuts was that they sell trays and assortments that catalog the sizes and they did not want the Tifco name on the nuts and have a hole in the middle of the line with a Mickey Mouse import rather than a consistent line of product." (*Id.*) After discussing the 9/16 nut situation with the appropriate personnel, Guthrie ordered the lowest amount of 9/16 nuts possible in order to complete Tifco's product line. (*Id.*)

3. Guthrie clearly was willing and able to supervise his employees.

Respondents also asserted that Guthrie was terminated and/or demoted because Guthrie was unwilling or unable to supervise his employees. Specifically, Bob Brown listed Guthrie's personnel problems and failure to supervise employees as follows:

1. Bootsie Rucker allegedly did not receive enough direction from Guthrie.
2. Joyce Hildebrandt, an expeditor under Guthrie's supervision, wrote a letter to Bob Brown complaining that certain changes needed to be made in the purchasing department.

Bob Brown testified that Bootsie Rucker, an employee supervised by Guthrie, came to Bob Brown in the summer of 1987 and complained about Guthrie. The undeniable motivation for Ms Rucker's "complaints" about Guthrie is obvious and described in Bob Brown's following deposition testimony;

Q. Are you aware that Bootsie Rucker was told not to ever follow Reed's instructions or orders?
A. No. I am aware that Bootsie Rucker came to me in the middle of the summer of 1987 complaining about Reed Guthrie.
Q. When was this now?
A. Middle of 1987.
Q. Can you be more specific as to time?
A. I would say—I believe it was late June 1987.
Q. And she had specific criticisms of Reed?
A. She felt that she was not getting any directions from Reed out of the Purchasing Department, and she felt like she was having to make a lot of decisions of the department. She felt like that she needed more recognition.

Q. She wanted more recognition?
A. That's correct.
Q. Do you mean a promotion or a raise or what?
A. *I think that she wasn't specific, but I took it to mean that, that she felt like she deserved either a raise or a change in title.*

(App. p. 18-19).

Bob Brown's testimony clearly shows that he recognized that Bootsie Rucker was merely posturing for a promotion and/or raise and "criticized" Guthrie to accomplish these goals.

The second supervision complaint leveled at Guthrie by Bob Brown involved *a letter written to Bob Brown* from Joyce Hildebrandt wherein she complained that certain changes and happenings in the Purchasing Department were detrimental to the Company. The dispositive fact in the above critism is that Ms. Hildebrandt wrote the letter directly to Bob Brown, as opposed to her complaint being referred to Bob Brown by Guthrie. Although Guthrie was Vice President of Purchasing and General Manager of Tifco when Ms. Hildebrandt wrote this letter, it is clear that Guthrie did not have the power to preclude Ms. Hildebrandt from writing this letter to Bob Brown. Ms. Hildebrandt's unilateral decision to send this letter reflects a recalcitrant and conniving employee and not Guthrie's inability or unwillingness to supervise his employees.

4. The evidence presented to the Courts below also shows that Guthrie effectively managed the Purchasing Department.

Respondents' "ineffective management " complaints exclusively focus upon Guthrie's alleged inability to control

inventory levels. Tifco's business historically was cyclical in nature and caused Tifco to experience temporary inventory and supply problems long before Guthrie was placed in charge of purchasing. (App. p. 11a, 16a). Besides the business cycle. Tifco historically experienced periodic inventory shortages caused by vendors' general reluctant to ship 100% of an order and vendors' shipments of defective products. (*Id.*) Guthrie testified that the only real way to prevent inventory shortages would be "to invest $20 million dollars in inventory which is not realistic." (*Id.*)

In addition, the oil industry was in constant flux during the 1980's, experiencing a severe downturn in the early 1980's, a recovery in late 1984 or 1985, and then a deterioration in 1986. (App. p. 16). Although the volatility of the oil industry made matching inventory supply to demand a tough task. Bob Brown testified that he recalled no complaints about Guthrie concerning the inventory level during this time. (*Id.*)

Besides the above industry-wide problems, Guthrie also had to deal with stubborn and uncooperative suppliers. Specifically, Bob Brown testified that Tifco experienced a shortage of hex nuts and flat washers during the summer of 1987, and blamed Appellant for this shortage. (Id.) Upon further examination, Bob Brown testified that the shortage of flat washers and hex nuts was not Guthrie's fault by stating as follows:

> Q. Did you investigate to see if those two reasons he gave you for the shortage were sufficient reasons or not?
> A. I remember that we tested some of the super hard and flat washers and found them to indeed have brittleness problems. And then we sent—*I believe we sent some samples back to the manufacturer*

and I believe they also confirmed that they had a problem with this particular shipment of a certain number sizes of these washers, yes.

Q. How about the other reason he gave you about the delay from the manufacturer?

A. That I don't remember specifically, other than that there were some specific problem with the manufacture getting—*some delay in the manufacturer getting the nuts down to us.* I don't remember spe- we were dealing with—I believe we were dealing with a manufacturer at that time trying to get some—getting those nuts privately branded, privately marked at that time. *That might have had some cause for the delay.*

(App. p. 17a).

Beyond that, Tifco decided to add a new line of drill bits to its product line and received quality complaints about these drill bits starting around the summer of 1987. (App. p. 18a). The complaints arose because the drill bits were off-specification because the manufacturer "had left out a process in the manufacturing steps." (*Id.*) Again, Guthrie cannot reasonably be criticized for a mistake made by the manufacturer, yet this is just what Respondents have done. Such shortages caused by factors beyond Guthrie's control occasionally forced Guthrie to practice "short buying," which required Guthrie to purchase certain necessary products from other sources at a premium price. The fact that such "short buying" is an unavoidable consequence in Tifco's industry is further evidenced by the fact that Aron Austin, Guthrie's younger replacement, testified that this practice is still employed today. (App. p. 26a). Therefore, the evidence is clear that although Guthrie occasionally had to engage in "short buying" and experienced inventory shortages at periodic intervals, market contingencies, not

Guthrie's management abilities, were the cause of such consequences.

Although the periodic inventory shortages in requisite "short buying" subjected Guthrie to unfounded and pretextual criticism, Respondents have adamantly contended that Guthrie's constant maintenance of overstocked inventory further justified his termination. Although Respondents contend that a major reason for terminating Guthrie was his inability to achieve this reduction, the evidence is clear that Aron Austin also has since been unable to reduce the over buying and has in fact presided over an increase in inventory supply.[3] Such evidence shows that not only has Guthrie's younger replacement been unable to reduce Tifco's inventory supply, he has actually increased the inventory figure over the two years since Guthrie left Tifco. The evidence clearly shows that Guthrie was willing and able to manage the inventory at Tifco, and Guthrie managed the inventory more succussfully than did his younger successor.

II.

THE DIRECT EVIDENCE REGARDING STATEMENTS MADE BY R. L. BROWN AND ROBERT BROWN TO GUTHRIE IS SUFFICIENT TO DEFEAT SUMMARY JUDGMENT AS TO PETITIONER'S A.D.E.A. CLAIM.

Appellant presented direct evidence to the lower courts

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3. Aron Austin testified that the dollar value of ending inventory fo 1989 was higher than the same figure for 1988. (App. p. 26a). Further, Larry Duke, Tifco's CPA, testified that the inventory on hand as of December 1989 was "a little over $2.2 million dollars" and indicated that such a figure represents "somewhat of a problem." (Id.)

comprised of statements made by R. L. Brown, the founder and president of Tifco, and Robert Brown to Guthrie that directly or indirectly referred to Guthrie's age. Besides establishing an A.D.E.A. violation by showing the pretextual nature of proferred reason to "legitimize" the termination of an employee protected by the A.D.E.A., a violation of the A.D.E.A. may be shown directly by producing direct evidence of such a violation. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981); *Olivera v. Nestle Puerto Rico, Inc.*, 922 F.2d 43, 47 (1st Cir. 1990). Although employers, such as Tifco, "are rarely so cooperative as to include a notation in the personnel file, "fired due to age,' or to inform a dismissed employee candidly that he is too old for the job," *Thornbrough*, 760 F.2d at 638. Guthrie introduced the following direct evidence of Respondents' violation of the A.D.E.A.:

1. R. L. Brown commented to Guthrie on three (3) occasions between 1985 and 1987 that Robert Brown, R. L. Brown's son and future president of Tifco, would "need to surround himself with people his age" when he became president of Tifco.
2. Guthrie testified that R. L. Brown and Robert Brown asked him on several occasions after 1985 how much longer Guthrie was going to work (App. p. 9-10a).

The court of appeals disregarded Guthrie's testimony and concludes that these comments are insufficient to establish discrimination because they are vague and remote in time and administrative hierarchy. Guthrie respectfully submits that such conclusion is erroneous.

A. The Statements Cited Above Are Not Vague and Do Support a Finding of Age Discrimination.

Statements less direct and more ambiguous than the statements described above have been held to support an inference of age discrimination. For example, in *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1463-1465 (5th Cir. 1989), the court held that the following two (2) statements were sufficient to support an inference of age discrimination and support the jury's finding of such discrimination:

1. The plaintiff was employed by Pepsi to stock various vending machines. Pepsi then reorganized the plaintiff's department and now required the plaintiff to deliver vending machines and syrup. The employee relations manager, after describing this new job, asked plaintiff "do you think you can handle it [the job]? Id. at 1463.

2. Plaintiff and Pepsi's employee relations trainee were present at a meeting at which plaintiff remarked "I have done heavy lifting all my life. I am not quite as young as I used to be." The employee relations trainee responded "yes, it's kind of risky at your age." Id. at 1465.

The above two statements were held sufficient to support the jury's findings of age discrimination.

It has also been held that an employer's indirect references to an employee's age can support an inference of age discrimination. See, e.g., *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1507 (5th Cir. 1988). In *Bienkowski*, the employee's supervisors commented to

the employee that he looked "sharp" if the employee were going to look for another job, and the supervisors also commented on the employee's inability or willingness to "adapt" to new systems within his department. The court stated that "we are unwilling to assume that indirect comments about his age and adaptability are not possibly probative of an unlawful discriminatory intent, given the parties' sharp disagreement over the operative facts of Bienkowski's performance." (*Id.*).

B. R. L. Brown's Comments Were Not Remote In Time.

The court of appeals further rejects Guthrie's contention that R. L. Brown's comments support an inference of age discrimination by concluding that such statements were made "at least a year before Guthrie's demotion" and thus were remote in time from Tifco's demotion of Guthrie. Given that the last statement was made in 1987 and that Guthrie was demoted in January of 1988, the last statement or statements could have been made within one month of Guthrie's demotion. However, even if such statements were made more than one year before Guthrie's demotion, this amount of time between the two actions does not render such statements remote in time. In *Normand v. Research Institute of America, Inc.*, 927 F.2d 857, 862-65 (5th Cir. 1981), statements made nearly a decade before an employee was constructively discharged and not even made in reference to the employee were sufficient to support the jury's verdict and require a reversal of the trial court's judgment n.o.v.

C. The Statements Made by R. L. Brown and Robert Brown Were Also Not Remote In Administrative Hierarchy.

Tifco never admitted that Appellant was discharged because of his age or that R. L. Brown had any influence on this decision. However, the evidence clearly shows that R. L. Brown was the founder and president of Tifco until he retired in 1985. Robert Brown, R. L. Brown's son, became president following R. L. Brown's retirement, and Robert Brown testified that he "discussed (terminating Guthrie) with my father (R. L. Brown) and I explained to my father the reasons for my decision." (App. p. 20a). Robert Brown's own testimony establishes that R. L. Brown at least had some influence over a personnel decision at Tifco and was not uninvolved in this process. R. L. Brown's consultation with Robert Brown concerning Guthrie constitutes involvement in an Tifco personnel decision sufficient to render R. L. Brown within the administrative hierarchy.

III.

CONCLUSION

The judgment of the Court below should be reversed and remanded.

Respectfully submitted,

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Reed L. Guthrie, Plaintiff-Appellant,

v.

TIFCO INDUSTRIES, et al.,
Defendants-Appellees.

No. 90-2635.

United State Court of Appeals,
Fifth Circuit.

September 13, 1991.

Employee brought suit, alleging age discrimination and pendent state law claims for wrongful discharge, breach of implied contract and intentional infliction of emotional distress. The United States District Court for the Southern District of Texas, Lynn N. Hughes, J., dismissed pendent state claims and granted employer's motion for summary judgment on age discrimination claim. Employee appealed. The Court of Appeals, Edith H. Jones, Circuit Judge, held that: (1) employee failed to establish that employer's stated reasons for demoting him were pretextual; (2) defendants' behavior toward employee was not extreme or outrageous, as required to support claim of intentional infliction of emotional distress; and (3) employee could not establish that he was discharged for refusing to perform illegal act as required to support wrongful discharge claim.

Affirmed.

Appeals from the United States District Court for the Southern District of Texas.

Before THORNBERRY, JONES, and WIENER, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Plaintiff-appellant Reed L. Guthrie sued Tifco Industries alleging a violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34, and pendent state law claims for wrongful discharge, breach of an implied contract, and intentional infliction of emotional distress. The district court dismissed the pendent state law claims, and granted Tifco's motion for summary judgment on the ADEA claim. Guthrie has appealed. Finding no reversible error, we AFFIRM the judgment of the district court.

I.

BACKGROUND

Tifco is a family owned business that distributes fasteners and automotive and industrial supplies. Guthrie was a valued Tifco employee from 1969 until he resigned in 1988. During those nineteen years, Guthrie received several promotions and salary increases. In 1975, Guthrie became Vice President of Purchasing and in 1985, he was promoted to General Manager.

After the president and founder of Tifco, Richard Brown, retired in 1985, his son, Robert Brown became president. Guthrie asserts that on three occasions between 1985 and 1987, Richard Brown remarked that Robert Brown would "need to surround himself with people his age." Guthrie also claims that after he returned to work following a serious illness in 1985, both Richard and Robert Brown asked "how much longer he wanted to work."

Tifco alleges that Guthrie's performance began to decline in 1987. Robert Brown testified in his deposition that Guthrie showed no interest in supervising employees, making decisions, or accepting responsibility. In January 1988, Robert Brown decided to move Guthrie from Vice President to Senior Buyer and reduce Guthrie's annual salary from $86,000 to $50,000, a forty percent decrease. Brown planned to discuss these changes with Guthrie on February 1, 1988, and prepared a handwritten list that detailed his dissatisfaction with Guthrie's performance. Guthrie, having discovered Brown's intentions before the meeting, resigned. He was then fifty-seven years old when he resigned.

II.

DISCUSSION

A. Standard of Review.

We review a summary judgment *de novo,* applying the same criteria as the district court. *Degan v. Ford Motor Co.,* 869 F.2d 889, 892 (5th Cir. 1989). Summary judgment is appropriate if there is "no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

B. The Elements of an ADEA Claim.

[1] The elements of a Title VII case, as set forth in *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973), applying to suits arising under the ADEA. *Bohrer v. Hanes Corp.,* 715 213, 218 (5th Cir. 1983), *cert. denied,* 465 U.S. 1026, 104 S. Ct. 1284, 79 L.Ed.2d 687 (1984). To establish

a *prima facie* showing of age discrimination the plaintiff must demonstrate that: (1) he was a member of the protected class; (2) he was qualified to perform the job; (3) he was discharged; and (4) he was replaced by a younger person or a person outside the protected class. *Elliott v. Group Medical & Surgical Servs.*, 714 F.2d 556, 562 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215, 104 S. Ct. 2658, 81 L.Ed.2d 364 (1984).

[2] A *prima facie* case creates a rebutable presumption of intentional discrimination. *Laurence v. Chevron, U.S.A., Inc.*, 885 F.2d 280, 283 (5th Cir. 1989) (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-54, 101 S. Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981). To rebut this presumption the employer must articulate some legitimate, non-discriminatory reason for its action. *Id.* An employer may sustain this burden by introducing admissible evidence of an explanation that would be "legally sufficient to justify a judgment for the defendant." *Bohrer*, 715 F.2d at 218 (quoting *Burdine*, 450 U.S. at 248, 101 S. Ct. at 1094).

[3] If the employer articulates legitimate, non-discrimatory reasons for its actions, the presumption created by the reasons for its actions, the presumption created by the plaintiff's *prima facie* case dissolves and the burden reverts to the plaintiff to prove that the employer's reasons were pretextual. *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 646 (5th Cir. 1985). The plaintiff can establish pretext by introducing evidence to prove that the reason stated by the employer, "though facially adequate, was untrue as a matter of fact or was, although true, a mere cover or pretext" for illegal discrimination. *Elliott*, 714 F.2d at 566. The trier of fact may not disregard the defendant's explanation without countervailing evidence that it was not real reason for the discharge. *Id.*

1. *Guthrie's Prima Facie Case.*

While Tifco concedes the first three elements of the *McDonnell-Douglas* test, it denies that Guthrie was actually or constructively discharged. Tifco contends that it did not want Guthrie to resign, but that Guthrie was now best suited by experience and training to be a Senior Buyer. According to Guthrie, the position of Senior Buyer represented a demotion, an intolerable situation from which he was forced to resign.

[4, 5] Constructive discharge can form the basis for a Title VII claim. *Vaughn v. Pool Offshore Co.*, 683 F.2d 922, 926 (5th Cir. 1982). In this case, Tifco demoted Guthrie from Vice President and General Manager to Senior Buyer, reduced his salary by forty percent, and assigned him to work for a man with less experience who was seventeen years younger than himself and a person whom he had helped train. Tifco points out that Guthrie's salary as Senior Buyer was higher than that of any other Tifco employee except the Vice Presidents. Although the circumstances surrounding Guthrie's demotion certainly were not outrageous, we are mindful that "to establish a prima facie case, a plaintiff need only make a very minimal showing." *Thornbrough*, 760 F.2d at 639. We accordingly assume *arguendo* that a reasonable person in Guthrie's position could have felt compelled to resign. Thus, Guthrie established his prima facie case.

2. *Tifco's Stated Reasons for Demoting Guthrie.*

[6] Tifco contends that it demoted Guthrie because Robert Brown lost confidence in Guthrie's management ability. Brown prepared a handwritten list of thirteen events leading to his loss of confidence in Guthrie. These events were:

1. Guthrie's failure to manage and train employees, including problems with Julie Newmiller, Joyce Hildebrandt, Bootsie Rucker, and Irene Konvica, resulting in Robert Brown's continued involvement in personnel problems;
2. Guthrie's failure to maintain adequate stock of basic hex nuts and washers in 1987;
3. Guthrie's failure to remain knowledgeable about quality dependable sources, for example Detroit diamond;
4. Guthrie's sleeping during internal managers meetings and during division managers meeting;
5. Guthrie's misbuying stock lines under his direct supervision;
6. Guthrie's failure to train buyers to buy within parameters and adjust stock between locations;
7. Guthrie's failure to respond to notices from the Texas Water Commission, resulting in potential revocation of the water permit;
8. Guthrie's failure to handle the internal recognition awards at the 1987 Tifco Christmas party;
9. Guthrie's failure to handle short buying responsibility resulting in the transfer of that responsibility to the distribution department in February 1987;
10. Guthrie's failure to evaluate the need for the product prior to order a fifty year supply of 9/16 nuts;
11. Guthrie's failure to negotiate a price for an entire series of nuts, instead ordering dissimilar nuts from RB & W and Detroit Diamond;

12. Guthrie's failure to deal with an angry vendor without passing the responsibility on to Robert Brown.

13. Guthrie's failure to obtain a credit for defective drill bits from Butterfield, although he had months to secure the credit and Butterfield acknowledged the drill bits were defective.

In addition to these reasons, Tifco states that in January 1988, Guthrie repeatedly failed to implement specific buying parameters that the managers had adopted to reduce inventory level. These non-discriminatory reasons for Guthrie's demotion are sufficient to rebut Guthrie's *prima facie* case and dissolve the inference of discrimination. After Tifco articulated these reasons for its employment decision, Guthrie was required to show that these reasons were not legitimate but were pretext to obscure discrimination. Because Tifco articulated its non-discriminatory justification for its employment decision in a motion for summary judgment. Guthrie was not required to prove pretext at that stage of the proceedings; instead, he needed to raise a genuine issue of fact regarding pretext. *See Thornbrough*, 760 F.2d at 646.

3. *Guthrie's Proof of Pretext.*

[7] In his response to Tifco's motion for summary judgment, Guthrie denied that he had ever slept during managers' meetings. After the district court granted Tifco summary judgment, Guthrie filed a motion for reconsideration in which he disputed several of Tifco's other stated reasons for his demotion.[1] Specifically, Guthrie disputes

1. The district court granted Tifco's motion for summary judgment on June 11, 1990, and entered final judgment on June 13, 1990. Guthrie filed his motion for reconsideration on July 10, 1990. Fed. R. Civ. P. 59 specifies that motions to alter or amend a judgment must

several of the criticisms on Brown's handwritten list, including allegations that Guthrie failed: to handle personnel problems; to maintain hex nuts and washers; to remain knowledgeable about sources, specifically Detroit Diamond; to handle short buying responsibility; to evaluate the need for 9/16 nuts before ordering a fifty year year supply; and to deal directly with an angry vendor.

[8] Tifco and Guthrie argue these specific points at length in their briefs. However, we need not determine which party more accurately describes each incident. Even if we accept Guthrie's versions, he has failed to establish pretext. What he has shown is that Guthrie and Brown differed in their views of certain business decisions. "The ADEA was not intended to be a vehicle for judicial second-guessing of business decisions." *Thornbrough*, 760 F.2d at 647.

Further, Guthrie simply failed to dispute Brown's remaining complaints that Guthrie failed: to train buyers; to respond to notices from the Texas Water Commission; to handle awards at the Christmas party; to negotiate a price for an entire series of nuts; and, to obtain a $10,-

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be filed no later than 10 days after entry of the judgment. Therefore, Tifco contends that Guthrie's Rule 59 motion for reconsideration was untimely and should be treated as a Rule 60(b) motion for relief from judgment, and the district court's denial of this motion should be reviewed for an abuse of discretion.

The transcript of the June 11, 1990, hearing reveals that the district court was fully aware of the time restrictions of rule 59, but nonetheless instructed Guthrie to file his motion for reconsideration on July 20, 1990. Counsel for Tifco agreed to this deadline. Although we do not approve of the district court's varying time limits set forth in the Federal Rules of Civil Procedure, in this case we will consider the evidence presented in Guthrie's motion to reconsider as if it were filed in accordance with the rules. Because Tifco will suffer no prejudice as a result, and Guthrie should not be penalized for complying with the district court's instructions.

739.03 credit for defective drill bits. Absent countervailing evidence, the trier of fact must accept the defendant's explanation as the real reason for the discharge. *Elliott*, 714 F.2d at 566. Brown's unrefuted complaints are sufficient explanation for demoting Guthrie; Brown lost confidence in Guthrie's management ability. As Guthrie failed to create a genuine fact issue whether Tifco's stated reasons for his demotion were pretextual Tifco was entitled to judgment as a matter of law.

4. *Age-Related Comments.*

[9] Guthrie also contends that Richard Brown's comments that Robert Brown would "need to surround himself with people his age" is direct evidence of age bias. Guthrie claims that Richard Brown made these comments on three occasions between 1985 and 1987. However, accepting Guthrie's allegations as true for purposes of reviewing this summary judgment, Richard Brown would have made these statements after his retirement, when he no longer made personnel decisions for Tifco. Further, these statements are to vague to be accepted as direct evidence of age-bias; Richard Brown could have been referring to his decision to retire. Finally, these statements were made at least a year before Guthrie's demotion. Because these comments are vague and remote in time and administrative hierarchy, they are no more than "stray remarks," which are insufficient to establish discrimination. *See Normand v. Research Institute of America, Inc.*, 927 F.2d 857, 864 n. 3 (5th Cir. 1991).

C. Intentional Infliction of Emotional Distress.

[10] The district court dismissed Guthrie's pendent state law intentional infliction of emotional distress claim,

apparently finding that Guthrie had failed to state a claim for relief. Although Tifco did not file a motion to dismiss pursuant to Rule 12(b)(6), the district court was authorized to consider the sufficiency of the complaint on its own initiative. *See* 5A C. Wright & C. Miller, *Federal Practice & Procedure* § 1357, at 301 (1990).

[11] Under Texas law, to prevail on a claim for intentional infliction of emotional distress a plaintiff must establish that the defendant acted intentionally or recklessly; that the conduct was "extreme and outrageous"; that the actions of the defendant caused the plaintiff emotional distress; and, that the emotional distress suffered by the plaintiff was severe. *Dean v. Ford Motor Credit Co.*, 885 F.2d 300, 306 (5th Cir. 1989) (quoting *Tidelands Auto. Club v. Walters*, 699 S.W.2d 939, 942 (Tex. App.—Beaumont 1985, writ ref'd n.r.e.).

[12] Guthrie contends that the evidence created genuine issues of fact on each element of his intentional infliction of emotional distress claim. In the precise wording of his objection, Guthrie apparently confuses the district court's dismissal order with a *sua sponte* summary judgment. If the district court had reviewed evidence outside the pleadings, this dismissal would be construed as a summary judgment, and the quality of the evidence would be pertinent. 5A C. Wright & C. Miller, *supra* § 1356 at 299. Here, however, this technical distinction has no bearing on the propriety of the district court's action. Even if Tifco's employees' behavior toward Guthrie was premeditated and organized, it simply was not extreme or outrageous.

D. Wrongful Discharge.

[13] The district court erroneously dismissed Guthrie's wrongful discharge claim as barred under the Texas two-

year statute of limitations. Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (Vernon 1986). Guthrie filed this suit, however, only fourteen months after his discharge. "Nonetheless, we may affirm a summary judgment on grounds other than those relied upon by the district court when we find in the record an adequate and independent basis for that result." *Meza v. General Battery Corp.*, 908 F.2d 1262, 1274 (5th Cir. 1990). Such a basis exists here.

[14, 15] Under Texas law, an employment relationship is generally terminable at the will of either party. *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985). The one narrow exception to Texas' employment-at-will doctrine "covers only the discharge of an employee for the *sole* reason that the employee refused to perform an illegal act." *Id.* at 735 (emphasis added). Because the refusal to perform an illegal act must be the sole reason for the plaintiff's discharge, Guthrie's claims of age discrimination and wrongful discharge are mutually exclusive.

[16, 17] In any event, this narrow exception applies only to employees discharged for refusing to perform acts that carry criminal penalties. *See Hancock v. Express One Int'l, Inc.*, 800 S.W.2d 634 (Tex. App.—Dallas 1990, writ filed). Guthrie contends that he was instructed to violate unspecified customs regulations, but he failed to allege that these regulations carry criminal penalties. Consequently, he could not establish that he was discharged for refusing to perform an illegal act. The order of dismissal was therefore appropriate.

CONCLUSION

For the foregoing reasons we AFFIRM the judgment of the district court.

APPENDIX

Entered Feb. 2, 1990

CIVIL ACTION NO. H-89-1089
REED L. GUTHRIE,
Plaintiff,

v.

TIFCO INDUSTRIES, Inc., et al.,
Defendant.

ORDER OF PARTIAL DISMISSAL

Guthrie's claims for wrongful discharge, breach of an implied contract and for extreme and outrageous conduct are dismissed. The defendants shall submit a motion for summary judgment by April 27, 1990. The plaintiff shall respond by May 11, 1990.

Signed on January 30, 1990, at Houston, Texas.

/s/ LYNN N. HUGHES
United States District Judge

Entered June 13, 1990

CIVIL ACTION H-89-1089

REED L. GUTHRIE,
Plaintiff,

v.

TIFCO INDUSTRIES, et al.,
Defendants.

FINAL JUDGMENT

1. Guthrie's motion for reconsideration (#13) is denied.
2. The defendants' motion for summary judgment (#12) is granted.
3. The plaintiff takes nothing from all defendants.
4. The plaintiff has until July 20, 1990, to more for reconsideration; the defendant has until August 10, to reply.

Signed on June 11th, 1990, at Houston, Texas.

/s/ LYNN N. HUGHES
United States District Judge

Entered August 15, 1990

CIVIL ACTION H-89-1089

REED L. GUTHRIE,
Plaintiff,

v.

TIFCO INDUSTRIES, et al.,
Defendants.

ORDER

Guthrie's motion for reconsideration of the summary judgment granted the defendants is denied.

Signed on August 13, 1990, at Houston, Texas.

/s/ LYNN N. HUGHES
United States District Judge

UNITED STATES COURT OF APPEALS
Office of the Clerk

September 13, 1991

MEMORANDUM TO COUNSEL OR PARTIES
LISTED BELOW

No. 90-2635 - Guthrie v. Tifco Industries, et al.

Enclosed is a copy of the Court's decision this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

/s/ GILBERT F. GANUCHEAU,
Clerk

By: Signature Illegible
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-2635

Filed October 21, 1991

REED L. GUTHRIE,
Plaintiff-Appellant,

v.

TIFCO INDUSTRIES, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING

Before THORNBERRY, JONES, and WIENER,

Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

By: EDITH H. JONES

United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. NO. H-89-1089

REED L. GUTHRIE,
Plaintiff,

v.

TIFCO INDUSTRIES, INC., RICHARD BROWN, ROBERT B. BROWN, LARRY DUKE, and ARON AUSTIN,
Defendants.

MEMORANDUM OF AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, Tifco Industries, Inc. (Tifco), Richard L. Brown (R. L. Brown), Robert B. Brown (Bob Brown), Larry Duke (Duke), and Aron Austin (Austin), submit this memorandum of authorities in support of their motion for summary judgment under Rule 36 of the Federal Rules of Civil Procedure as follows:

* * *

[11]

The fact that Guthrie was offered the position of senior buyer at a rate of pay $10,000 per year higher than any other buyer, or, for that matter, any internal Tifco employee other than the Vice Presidents, R. L. Brown, and Bob Brown, is strong evidence that Tifco did not intentionally discriminate against Guthrie. Exh. 1. Tifco demoted Guthrie because of his unwillingness to accept responsibility, make decisions, supervise employees or effectively manage his department. None of the decisions with regard to Guthrie were made on the basis of age. Tifco did not discriminate against Guthrie on the basis of age.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. NO. H-89-1089

REED L. GUTHRIE,
Plaintiffs,

v.

TIFCO INDUSTRIES, RICHARD L. BROWN, ROBERT B. BROWN, LARRY DUKE, and ARON AUSTIN,
Defendants.

DEPOSITION OF REED L. GUTHRIE

JULY 26, 1989

[25]

* * *

Q. During your career at TIFCO, did you have any prolonged absences?

A. The only one I can recall was in 1985, April 15th, I had a health problem that started with a clot in my leg. And while they were trying to figure out where the clot came from, they discovered that I had a malignant tumor on my left kidney.

And they quit looking for the clot and started looking at the kidney and ultimately decided they had to take it out, which they did.

And while they were—while I was on the table and the urologist got out of the way, the cardiologist came in and rumbled around in my abdomen until he found a aneurysm on my iliac aorta. * * *

* * *

[37]

Q. Why did you not want to work for Aron Austin?

A. Because he didn't have any background in purchasing. I had 29 years of experience in purchasing. He had none.

* * *

[52]

Q. Anything else that made you think this event had caused you to ask whether this event had anything to do with your age?

A. Yes. The preceding—almost for two years preceding the January 29th date of '88, R. L. Brown had told me on numerous occasions—several occasions, let

me put it that way—that Bob was going to need to surround himself with people his age.

And that after my illness in '85, both Bob and R. L. Brown asked me on several occasions how much longer I wanted to work.

* * *

[89]

Q. So you raised a question with Mr. Brown about that?

A. I did the bid like I felt it should be done for TIFCO's sake. That's the one time in my 19 years with TIFCO that Mr. Brown ever literally called me on the carpet.

Q. Tell me about how you got called on the carpet.

A. Bob called me down to his father's office; and they both said, you know, "We didn't get the Salt River Nuclear Project plant because we didn't bid on everything."

* * *

Q. Now, the next point you said U. S. Custom repackaging and country of origin. Tell me what you mean by that.

A. The Customs Department published a

[90]

regulation that any bulk buyer of any kind of product who subsequently repackages it in any form has to put on the new package the country of origin that was on the original container.

* * *

And it was my understanding from Bob Brown that on the advice of Jack Bailey there were no teeth in that provision and—at that time and we didn't have to comply with it. And to my knowledge we hadn't as of January 29, 1988.

Q. You do not believe the company was complying with your understanding of the custom regulations.

A. Correct.

Q. Were you ever told to do something in that regard?

A. I was told to watch the newspapers and the trade journals for what was current in that regard.

[91]

* * *

Q. Were you ever put in a position there in your employment with TIFCO of either doing something illegal or losing your job?

A. Before the fact. no. After the fact I'm not sure.

* * *

[121]

Q. What about you, managing the purchasing department, did you like to hear complaints?

A. It happened for 19 years. You are going to be out of something all the time anyway. There's no way to prevent it. You can prevent it if you want to invest $20 million in inventory, which is not realistic.

* * *

[129]

* * *

Q. How did Detroit Diamond get into the hunt, so to speak?

A. I looked them up in the McCray's blue book.

Q. Hadn't they been a supplier some time ago?

A. Twelve or fifteen years ago we bought a "cone lot" from them for a sales ag that was selling in Tulsa, Oklahoma. He lost the account. We sent it up. Detroit wouldn't take the product back. We don't buy the small quantities. We needed to complete the line to continue viably selling it. And they cut us off for low purchases so we had no source. And until this scare on the

[130]

grade 8 cap screws came up, I didn't try to use them again.

Q. Didn't you opine to Richard Brown you thought they were out of business?

A. No, sir. I knew they were a specialty nut manufacturer. * * *

* * *

[138]

* * *

A. * * * And the major reason they wanted to go ahead and add the 9/16 nuts was that they sell trays and assortments that catalog the sizes and they did not want the TIFCO name on the nuts and have a hole in the middle of the line with a Mickey Mouse import rather than a consistent line of product.

* * *

[150]

* * *

A. * * *
the lot." And I shipped them back.

He said, "Who authorized that?" I thought it was a fluff-off question; so I said, "The president of the company looked at the lot and has agreed they are unacceptable so they are being shipped back."

And I think he was bluffing.

* * *

[256]

* * *

Q. When Mr. Duke told you that what was contemplated was a position of senior buyer at $50,000 and supervision by Mr. Aron Austin, he told you sometime during the 29th about that. Right?

A. Yes, sir.

* * *

[1]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-89-1089
REED L. GUTHRIE

v.

TIFCO INDUSTRIES
DEPOSITION OF ROBERT B. BROWN

* * *

[19]

* * *

Q. As a buyer for however long you were called a buyer in the early part of your career, did you have difficulty personally in getting fasteners for the company?

A. During one period of time there was a problem getting fasteners. There was another buyer that was responsible for the fastener lines that had not—that had let our inventory run down to a very low degree. And we had been experiencing a lot of shortages of our bread and butter product

[20]

line.

And I was forced to go with this buyer and fly up north to a lot of our vendors and literally beg them to sell us product.

* * *

Q. Now, Mr. Guthrie was not in charge of purchasing at that time I take it?

A. As I remember, I don't believe he was there at that time.

* * *

[66]

* * *

Q. Did you have any planning part in the decision to make Mr. Guthrie general manager as well as vice president in February 1985?

A. I think I did play a small part in that.

* * *

[74]

* * *

Q. Next let's take the roof. The roof leaks?

A. Uh-huh.

Q. When did you first notice that there were roof leaks?

[75]

A. We noticed that there were roof leaks right after we moved into the building.

* * *

[81]

* * *

Q. Wts it Mr. Guthrie who was in charge of getting the contractor out there to try to repair the roof?

A. It's my understanding yes, it was.

* * *

Q. Did you blame Mr. Guthrie because the roofing contractor couldn't stop the leaks?

A. I don't think I really blamed Reed for that. * * *

Q. Did you have some blame or criticism then of Mr. Guthrie in association with these leaks of the roof?

A. Wel, the problem I would have is if we have a five-year warranty on our roof that we didn't take some action to require that roofing subcontractor to fix our roof before the warranty perid would run out, thereby creating a problem for us to have

[82]

five-year warranty on the roof. * * *

* * *

[91]

* * *

A. Yes, 1985 would have been a year where our business was starting to pick up again, yes.

Q. Had you slowed down purchasing during the year 1984 before the comeback started?

A. I would have to assume that we did to try to match the slowdown in sales. You try to match your purchases in relationship to the sales.

Q. Did you make a conscious effort to be careful as to how many—how much in purchasing you did so you wouldn't have an oversupply of inventory in a down market?

A. That would be prudent, yes, to do.

Q. And do you feel that Mr. Guthrie succeeded in

[92]

doing that prudently?

A. I don't remember exactly what Reed did during that particular time period.

Q. Do you remember any complaints you had about him in that regard?

A. I don't recall any complaints concerning the inventory level, no.

* * *

[122]

* * *

Q. Did you investigate to see if those two reasons he gave you for the shortage were sufficient reasons or not?

A. I remember that we tested some of the super hardened flat washers and found them to indeed have brittleness problems. And that we sent—I believe we sent some samples back to the manufacturer, and I believe they also confirmed that they had a problem with this particular shipment of a certain number sizes of these washers, yes.

Q. How about the other reason he gave you about the

[123]

delay from the manufacturer?

A. That I don't remember specifically other than that there was some problem with the manufacturer getting—some delay in the manufacturer getting the nuts down to us. I don't remember specifically what that was.

However, I do know that we were dealing with—I believe we were dealing with a manufacturer at that time trying to get some—getting those nuts privately branded, privately marked at that time. That might have had some cause for the delay.

* * *

[130]

* * *

Q. Let's go to the drill bit situation. * * *

A. Well, the drill bit situation was kind of an ongoing problem area. I think it started around the summer of '87 and continued through, I think, January of '88, or it was finally resolved in January of '88.

Q. When did it first come to your attention as a problem?

* * *

[131]

* * *

A. That was at one of our managers' meetings, and it was reported back that we were getting some complaints about a new line of drill bits that we had added to our line. * * *

* * * And Reed contacted the vendor and found out from the vendor, who was named Union Butterfield, that they had left out a process in the manufacturing steps.

* * *

[144]

* * *

Q. Are you aware that Bottsie Rucker was told not to ever follow Reed's instructions or orders?

A. No. I am aware that Bootsie Rucker came to me in the middle of the summer of '87 complaining about Reed Guthrie.

Q. When was this now?

A. Middle of 1987.

Q. Can you be more specific as to time?

A. I would say—I believe it was in late June 1987. And she had specific criticisms of Reed. She felt that she was not getting any direction from Reed out of the purchasing department, and she felt likt that she was having to make a lot of

[145]

decisions of the department. She felt like that she needed more recognition.

Q. She wanted more recognition?

A. That's correct.

Q. You mean a promotion or a raise or what?

A. I think that she wasn't specific. But I took it to mean that, that she felt like she deserved either a raise or a change in title.

* * *

[150]

* * *

Q. What was it specifically about the quality of finished hex nuts in October 1987 that makes you critical of Red Guthrie?

A. Basically we had gotten in a shipment of finished hex nuts in from a vendor; and Reed came to me and said that he had—that we had received a shipment of finished hex nuts from this vendor, and that there was a lot of problems with the quality on them.

And he had just been out to the purchasing— * * *

[151]

or out into the receiving area, and had looked at them. And he asked me if I would like to look at them also, and I said "Sure."

So I went out there with Reed, and we looked. He showed me—we opened up a bunch of different kegs and we looked at these finished hex nuts, and the quality of these nuts were very poor. There were problems with —I think the nuts being tapped off center, there was a lot of burs, there was just generally just poor, poor quality.

And Reed pointed this out to me. And I asked—you know, he asked me—or I asked him, "What do you think we should do?" And he volunteered, he said he felt we should return the entire shipment. And I agreed. I said "Sounds good."

* * *

[158]

Q. No. My question is: Did you discuss with your father before a decision was made to demote Reed

[159]

Guthrie each and all of these reasons that I have just listed for you?

A. I discussed with my father, and I explained to my father the reasons for my decision; and I also had a couple more reasons that were not on that list.

* * *

[194]

* * *

. . . Item nine was the question about Mr. Guthrie ordering 9/16 hex nuts.

A. That's correct.

Q Will you tell me what your criticism of him was about that?

A Basically that had to do with Reed placed an order

for some private branded hex nuts; and he came into my office and he showed me the size of the purchase order, the magnitude of the purchase order, and he said, "I'm fixing to place this purchase order. Is this okay."

And I looked at it, and I looked at the amount and I said, "It looks like it's fine to me."

And basically—after the order came in, Frank Adams came to me in my office, and he said, "Do you realize that we ordered a 50-year supply of 9/16 nuts." And I said "No, I didn't really

[195]

realize that."

* * *

And I felt that if Reed would have brought it to my attention that we were ordering a 50-year supply of these nuts, that I would have made a different decision as far as ordering these nuts. And I felt that was my criticism in that case.

Q Well, are you saying that Reed Guthrie didn't have some reason that he communicated to you about ordering so many hex nuts of this size?

A No. I believe Reed had to order that quantity of hex nuts to get a minimum production line.

[196]

The thing where I fault Reed for is not bringing it to my attention that he was going to—this placing of this minimum production line was going to run approximately a 40 or 50-year supply of these nuts, and do you really want to place—make that type of investment.

And I would have said no at that point in time.

* * *

[202]

* * *

Q And then down below it has blanks for where you, as the person who is evaluating him, makes some check mark as to his ability, conduct, attendance and production.

A. That's correct.

Q And on January 1, 1986 you yourself rated Mr.

[203]

Guthrie as excellent in ability, didn't you?

A. That's correct.

Q. Which is the highest rating, correct?

A. That's correct.

Q. Likewise as excellent in conduct, correct?

A. That's correct.

Q. Likewise in attendance, excellent?

A. That's correct.

Q. And likewise in production, excellent?

A. That's correct.

* * *

Q. If you had had one of these forms that you filled out on January 1, 1987 for Mr. Guthrie, these same blanks available to check, what would your check marks have been?

A. Beginning of 1987?

[204]

Q. January 1, 1987.

A. I would probably rate Reed's performance as very high. * * *

* * *

[157]

A. After I gave the responsibility for expediting back to Reed there—we had a problem with one of the expediters under Reed's supervision whose name was Joyce Hildebrandt. And she wrote me a letter basically stating that she felt that she was going to have to terminate her employ with Tifco, and that she felt certain changes that were going on in purchasing were not to the benefit of the company basically.

And basically where my problem in that was that I instructed basically Reed—I instructed Reed that I did not want to be involved with the personnel problems in his departments any longer. * * *

* * *

INTHE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-89-1089

REED L. GUTHRIE

v.

TIFCO INDUSTRIES

DEPOSITION OF RICHARD L. BROWN

* * *

[25]

Q. Did you feel like he got back to work pretty quickly after his problem?

A. Yes, I thought so. Maybe too soon. I don't know.

* * *

[27]

Q. Did you observe something in particular that made you feel that way? Did he not come to work as often, did he come to work and sleep through the day, take long lunches? What is it he did to indicate to you he had a change in attitude?

A. I'm not aware of his working schedule, and the

[28]

only thing—the only thing I ever noticed was the apparent problem of concentrating in meetings or in discussions. And that's a vague thing, but it's an impression that I had.

* * *

[34]

* * *

A. I only had one conversation with Mr. Guthrie about any question; and that was at the time I asked him if he had any medical problem, and he said "No." And I asked him if he was taking any kind of medication, and he said "No." And that was it.

* * *

[1]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-89-1089

REED L. GUTHRIE

v.

TIFCO INDUTRIES

DEPOSITION OF ARON A. AUSTIN

* * *

[41]

Q. Whether exactly or not, do you remember if the '89 figure was higher or lower than '88?

A. I don't remember exactly. I would suspect that it was higher at the end of '89 than it was at the end of '88. But I don't remember specific numbers about inventory dollars from a month to month or certainly a year to year basis.

* * *

[103]

* * *

Q. * * * Have you at any time since Reed Guthrie left run into anymore problems with the time it took to effect the short buy, that is, to get the order placed and get delivery within the period of time that you want to achieve. Have you had anymore problems?

A. I'm sure we have had a situation or an instance

where that has been a problem, where that particular thing has happened.

* * *

[121]

Q. The one occasion between '82 and '87; do you mean you got a shipment of flat washers in and some of them were brittle by your testing or by your customer complaints?

A. We had some customer complaints to the degree that we sent out a bulletin to the sales force that said if you will send us back all of that particular washer that's in your customers bins we're going to replace those washers at no charge to the customer.

I do remember that specifically being one of the times.

Q. And this is sometime between '82 and '87?

A. If my memory is correct, and I'm almost sure it is, it would have been within that time frame, yes.

Q. Did Mr. Guthrie, was he the person who was responsible for getting the word out that the

[122]

washers needed to be replaced?

A. I don't remember if Reed's name was on the bulletin that went out to the sales force.

He was certainly responsible for purchasing then.

Q. Did Mr. Guthrie take care of the problem during this instance between '82 and '87, where you had gotten the bad lot in and had to recall them?

A. Well, we shipped out good washers, the problem recurred; but I'm sure that time we got the problem taken care of.

I don't know if Reed specifically talked to those people himself or not. But we did receive replacement products, I'm sure.

Q. And he was in charge of making sure that happened?

A. I assume, yes, he was.

* * *